

SERVED: April 30, 1993

NTSB Order No. EA-3869

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 19th day of April, 1993

|                                  |   |                     |
|----------------------------------|---|---------------------|
| _____                            | ) |                     |
| JOSEPH M. DEL BALZO,             | ) |                     |
| Acting Administrator,            | ) |                     |
| Federal Aviation Administration, | ) |                     |
|                                  | ) |                     |
| Complainant,                     | ) |                     |
|                                  | ) |                     |
| v.                               | ) | Docket SE-11130 and |
|                                  | ) | SE-11131            |
|                                  | ) |                     |
| STEPHEN CLAIR ERICKSON and       | ) |                     |
| THOMAS PHILLIP NEHEZ,            | ) |                     |
|                                  | ) |                     |
| Respondents.                     | ) |                     |
|                                  | ) |                     |
| _____                            | ) |                     |

**OPINION AND ORDER**

The respondents have appealed from the oral initial decision Administrative Law Judge William A. Pope, II, issued in this proceeding on October 2, 1990, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed the Administrator's orders suspending respondents' airline transport pilot certificates on allegations that they violated

---

<sup>1</sup>An excerpt from the hearing transcript containing the initial decision is attached.

sections 121.651(a)(1) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. Parts 121 and 91,<sup>2</sup> as a result of their takeoff on an American West Airlines flight when they did not have at least 1600 feet of runway visibility, as required by their company's operations specifications. The Administrator found that the actions of respondent Erickson, the pilot-in-command, warranted a 60-day suspension of his certificate, and that the actions of respondent Nehez, the second-in-command, warranted a 30-day suspension of his certificate, but waived those sanctions as a result of respondents' timely filing of reports under the Aviation Safety Reporting System (ASRP).

The facts underlying the suspension orders are not in dispute, nor is the violation of section 121.651(a)(1). At the time of the takeoff, the weather was deteriorating, and a National Weather Service special observation report indicated that the runway visual range ("RVR") for the runway on which respondents intended to depart, was 800 feet. The air traffic

---

<sup>2</sup>FAR §§ 121.651(a)(1) and 91.9 provided at the time of the incident as follows:

" § 121.651 Takeoff and landing weather minimums: IFR: All certificate holders.

(a) Notwithstanding any clearance from ATC, no pilot may begin a takeoff in an airplane under IFR when the weather conditions reported by the U.S. National Weather Service, a source approved by that Service, or a source approved by the Administrator, are less than those specified in-

(1) The certificate holder's operations specifications....

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

controller on duty questioned respondent Nehez on what their RVR minimum was,<sup>3</sup> and respondent Nehez concedes that when he looked at his Jeppesen Approach Plates, he misread his RVR requirements to be 600 feet, when in fact it was 1600 feet. Both respondents further admit that their company's operations specifications require a minimum RVR of 1600 feet unless certain exceptions exist, which was not the case here.<sup>4</sup>

The law judge found that respondents' failure to comply with their operations specifications was a result of their failure to check their operations specifications before departure, and since they had a duty to do so, their actions constituted carelessness under FAR section 91.9. Citing Board precedent for the proposition that, as a result of their carelessness, persons and property were at least potentially endangered, the law judge sustained the allegations of violations of sections 91.9 and 121.651(a)(1). On appeal, respondents contend that the finding of a violation of section 91.9 was erroneous. Respondents further assert that the sanctions assessed were too harsh. The Administrator has filed a brief in reply, urging the Board to affirm the law judge's initial decision.

Upon consideration of the briefs of the parties, and of the

---

<sup>3</sup>The controller explained that he did not deny respondents' request for a departure clearance because RVR minimums may vary from company to company.

<sup>4</sup>Respondent Erickson heard the discussion with air traffic control, but erroneously believed that the runway they were about to depart from fell within an exception contained in the operations specifications.

entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's orders. For the reasons that follow, we will deny respondents' appeal.

Respondents contend that the evidence fails to support the finding of a FAR section 91.9 violation because the Administrator did not establish that their carelessness created a likelihood of potential harm which was "unacceptably high," or that their exercise of judgment in the matter was "clearly deficient," citing Administrator v. Reynolds, 4 NTSB 240, 242 (1982). Respondents' reliance on the standard set forth in the Reynolds decision is misplaced. The Board explained in the Reynolds decision that helicopters have control and maneuverability characteristics which require a pilot under certain circumstances to exercise subjective judgment to determine what measures are necessary to ensure the helicopter's safe operation. Id at 242.<sup>5</sup> Thus, Reynolds is clearly limited in its scope to only those cases involving helicopters.

With regard to fixed-wing aircraft, it is a well-established proposition that evidence of potential endangerment to life or property is sufficient to establish a violation of section 91.9.

---

<sup>5</sup>Respondents also cite Essery v. DOT, 857 F.2d 1286 (9th Cir. 1988) in support of this argument. Although Essery seems to extend the Reynolds standard to fixed-wing operations, id. at 1287, a careful reading of the entire court decision, in conjunction with the Board's underlying decision, Administrator v. Essery, 5 NTSB 609 (1985), suggests otherwise. In any event, we can state unequivocally that the Reynolds standard was intended to apply only to helicopter operations and is therefore inapposite to the case sub judice.

Administrator v. Dutton, NTSB Order No. EA-3204, at 7, n.8 (1990), and cases cited therein. Respondents' operation of a passenger-carrying aircraft,<sup>6</sup> on takeoff, from a runway where visibility was below RVR minimums, and while other aircraft were operating in the airport area (according to the air traffic control communications tape entered into evidence), amply supports a residual finding of a violation of FAR section 91.9 here.<sup>7</sup> The potential for endangerment was not "hypothetical," as respondents claim, and the fortuitous circumstance that no one was actually harmed by their carelessness does not mean that they had not jeopardized their passengers' safety within the meaning of the regulation.<sup>8</sup>

Turning to the issue of sanction, we have previously held that where the sanction is waived under the ASRP, the appropriateness of the sanction will not be reviewed by the Board

---

<sup>6</sup>No evidence was offered into the record that passengers were actually on board American West Flight 19, but the law judge stated in his findings that this was a passenger-carrying flight, without objection from respondents.

<sup>7</sup>Respondents' argument that the law judge should have dismissed the 91.9 allegation at the close of the Administrator's case because the Administrator failed to produce any evidence of actual endangerment, is also contrary to long-standing Board precedent. The Administrator need not show actual danger created by the operation of a fixed-wing aircraft in order to establish a violation of section 91.9. Administrator v. Haarer, 4 NTSB 1812, 1814 (1984). Moreover, we decline to consider the excerpt of the Administrator's Compliance and Enforcement Bulletin regarding section 91.9, referred to in respondents' appeal brief. That information was not entered into evidence, and it is not properly before the Board in this proceeding.

<sup>8</sup>Nor is the fact that a tragedy did not occur mitigating as to sanction.

on appeal. Administrator v. Friday, NTSB Order No. EA-2894, recon. denied, NTSB Order No. EA-2954 (1989). The Administrator asks the Board to reconsider that position, asserting that the length of the waived sanction may be relevant in his determination of sanctions against respondents whose violation histories include waived sanctions. We decline to do so. Whatever relevance a waived sanction may be to the Administrator in his enforcement program is a matter within his discretion.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondents' appeals are denied; and
2. The Administrator's orders and the initial decision are affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.